Supreme Court, U.S.
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No. 80-45

Supreme Court of the United States

October Term 1979

Eugene Johnson III, Petitioner

v.

J.O.L. II, Respondent

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a statute constitutionally authorize an adoption over the objection of a natural parent on the ground that the parent's non-consent is found to be "contrary to the best interests of the child", whether the statute is viewed facially or as applied to a divorced parent granted visitation rights, where there is no parental abandonment, abuse or unfitness.

2. Whether divorced parents who have visitation but not custody rights *per se*, may be properly treated by lesser constitutional standards and reasons than those who are not divorced, such that the establishing of greater security in the stepparent unit or the avoidance of conflicts arising from visitation orders, would be constitutionally sufficient reasons for the state

to grant the permanent severance of the relationship between the natural parent and his children through its adoption statutes.

3. Whether the lack of any specific substantive, procedural and evidentiary standards for the interpretation of an adoption statute that allows the permanent severance of the parent-child relationship solely on a basis of what is stated to be the "best interests" of the children, is constitutionally permissible as a matter of notice and substantive right.

LISTING OF PARTIES

The petitioner is the natural parent, Eugene Johnson III. This is an adoption proceeding. As a result of the decision there are certain restrictions on names. Separately filed are the names of the respondent stepparent, here called J.O.L. II, and the former wife, each of whom was a party below.

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On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Eugene Johnson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered on December 10, 1979 on the grounds and bases hereafter appearing.

OPINIONS BELOW

The unreported Opinion and Findings of the Trial Court appears in the Appendix to this Petition (App. 1-13).

The decision of the District of Columbia Court of Appeals, styled as "In the Matter of Petition of J.O.L. II for Adoption of Minor Children. Appeal of Eugene Johnson III" is officially reported as "Petition of J.O.L., D.C.App. 409 A.2d 1073 (1979)." The slip opinion of that Court appears in the Appendix to this Petition (App. 14-20). The official report references also appear therein.

The Order and Judgment of the Court dated March 27, 1980 denying the Petition for Rehearing En Banc appears in the Appendix at App. 21.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on December 10, 1979.

A timely petition for rehearing en banc was denied by a majority of that Court (two judges stating they would vote to grant the petition) on March 27, 1980.

A motion for extension of time to file this petition to and including July 10, 1980 was granted on June 17, 1980 by order of the Chief Justice, No. A-1100.

This Court's jurisdiction is invoked under 28 U.S.C. 1257(3) in the light of this Court's rulings in Palmore v. United States, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973) and Key v. Doyle, 434 U.S. 59, 98 S.Ct. 280, 54 L.Ed.2d 238 (1977).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First, Fifth, and Ninth Amendments and to the extent analogous, the Fourteenth Amendment of the Constitution of the United States, all set forth in the Appendix to this Petition (App. 22).

The critical statutory provisions are set forth in D.C. Code 1973, Title 16 § 304(a) through (f). The entire Code provision is set forth in the Appendix (App. 23-24).

Particular attention, however, is called to Title 16-304(d) and 304(e). Title 16-304 of the D.C. Code provides in part (a) what is required; in part (b) when consents are necessary; and for pertinent portions here, namely subsections 304(d) and 304(e) which authorize an adoption where consents are not obtained in certain

circumstances. They read as follows:

304(d) When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required.

304(e) The court may grant a petition for adoption without any of the consents specified in this section when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child.

STATEMENT OF THE CASE

This action began with a Petition for Adoption of the two natural children of this petitioner, Eugene Johnson, by a step-father who married the natural mother upon her divorce from the natural father. He is named in the current proceedings as "J.O.L. II." For ease of reference, first names will be employed here. The step-father is John (J.O.L. II). The natural mother is Deborah (D.W.L.). The two children are Judith and Elliott. The natural father who was the appellant below and is the petitioner here is Eugene (E.J. III).

The Petition by stepfather John for the adoption of Judith and Elliott was filed on March 31, 1977, and rested its grounds on 16 D.C. Code, 1973 Edition, Sec. 304(d) based on an alleged abandonment

and Sec. 304(e) based on an alleged "best interests" standard. Eugene objected and answered at length (R. 6-14).

The critical ultimate and actual "historical" findings are of course in the Trial Court's opinion (App. 1-13).

The evidence and findings by the Trial Court in this case show that Eugene has had his children adopted from him, primarily because he exercised visitation rights which the Court had awarded in 1971 and 1972. Those rights involved his natural daughter, Judith, born in October 1964 and his natural son, Elliott, born in January 1966 (R. 196, App. 2).** The

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** Elliott is really Eugene Elliott, after his natural father, as the Petition shows (R. 1). The Trial Court, evidently relying on the erroneous testimony of the mother that he was born in 1967 rather than 1966, so found (W.Tr. 5, mother's testimony; R. 196, birth finding).

divorce of Deborah and Eugene, obtained by her in the Virgin Islands, was in 1968 (R. 196; App. 2; W.Tr. 13).

The found facts indisputably reflect that the children involved in this proceeding refused to go on visitations, resisted visitations; and stated that they did not care about their natural father, did not want to see him, would not see him, and in general, whether derived from either the natural mother or stepfather or their own misperceptions, so acted as to create the very conditions which resulted in the ultimate decree (App. 3-5; 8; 12-13).

The only found basis of this "adoption," in short, rests upon what the Trial Court's Memorandum Opinion conceded was at the heart of the problem: "the considerable resistence" to Eugene's exercise of his natural visitation rights (App. 4; R. 199); the fact that the children

"would create a ruckus" and "refuse to accompany him anywhere" (App. 4; R. 197), the "times" he was "insulted" (App. 4; R. 197) and, in the end, how the Court accepted that fact as likely to continue, and so decided to resolve that condition by severing the relationship permanently based on a "best interests" standard (App. 12-13; R. 205-207).

The Court stated that it was "in sympathy with the "pain" that permanent severing would cause Eugene (App. 11; R. 205). It acknowledged and conceded that Eugene's visits "from the time of his divorce until the last visit in 1972 (were) <u>often against the desire of (the children's) mother and petitioner (John)</u>" (App. 7; R. 201, emphasis added). Its findings acknowledged and conceded that to exercise his rights, Eugene "continually sought legal recourse" (App. 11; R. 201) and although he received

the legal right, it was in fact what went on when it was exercised (the ruckus, the resistence, the insults) that induced him to cease pressing for the right; and, as the Court acknowledged and found, "at the expense of much personal pain, (Eugene) decided to discontinue his visits with the hope that when the children were older, they would recognize the affection he felt for them and understand that he was a legitimate part of their lives" (App. 4; R. 198).

The Court not only found these facts, it found more. It even found that it was Eugene's very "continued interest in his children which precipitated the (adoption) action" itself (App. 7; R. 201). It, of course, found no abandonment at all even though visitation stopped after the last ruckus in 1972 (App. 7; R. 201). It found that throughout the natural father's

actions --- even in stopping his visitations with his children because of the "adverse emotional effect" they had (App. 11, R. 205) and the "emotional disturbance" those visitations caused (App. 12; R. 206) --- were all "motivated by parental love and concern rather than dereliction of duty" (App. 8; R. 203). It is to these ultimate and found "historical" facts that the "constitutional" facts, standards and principles must apply. The Court of Appeals used a term never found in fact below --- that these visitations caused "extreme emotional stress". That fact aside, it is clear from even its extensions of the findings that there was no claim that the children were in actual therapy or in need of it, that they were being treated or that the decision below was justified on grounds other than quoted by the appellate court at the conclusion of its Opinion from the decision below (App. 20).

The cause and reason for the cessation of visits is undisputed. After Eugene's hospitalization in 1967 and during the period awaiting divorce and thereafter, Deborah insisted there be no visitations unless a third person be present. That third person was the stepfather who married Deborah. All parties agreed that Eugene objected to that demand and therefore saved some money to go to court for another order. The need of the father to go to court to obtain a court order; his agreement pending final hearing to a third party's presence if it were not the stepfather; and the final order where no third person was to be present were the background circumstances that led, finally, to his ceasing of his visits until the ruckuses would stop and the children were of age to accept him.

There was considerable evidence of different life-styles (W.Tr. 40, T.Tr. 22).

While the Court of Appeals decision noted that there were some problems with the father, the Trial Court never found that the children were affected by that fact.

For the sake of argument, however, we exclude that factor. Accepting all of the extensions of the findings, the issue was not the legal sufficiency for the Court to find adverse emotional effects from the visitations but the constitutional sufficiency of those facts.

There was no doubt, as in many visitation cases, that there was stress; and no doubt the children stated that they preferred the stepparent unit. They each recognized, however, as the son said, if adoption were not granted and "if we lost, it wouldn't change my life" (F.Tr. 247-248); that "the big advantage of the adoption would be to keep Gene (the father) from coming around" and "sort of declare (us)

legally (a family)" (F.Tr. 248). As the daughter said, it would mean that they would not be "hassled" as she was on her birthday "which made me upset...I got some roses that said 'from your loving father or 'dad' or something like that. And we wouldn't have to bother with any of those. And no phone calls or visits or anything like that...it was sort of bothersome. ....It just made me upset" (F.Tr. 236, 238).

The psychiatrist found only the potential for serious stress if visitation resumed, acknowledged that the children did not need treatment and viewed the visitations as "impositions" of them that induced him to recommend an adoption (W.Tr. 92-3;108).

The idea of a lesser alternative such as counselling or something short of permanent severance was ignored or rejected at all levels --- psychiatrically and in the Opinions below in the Court of Appeals and the Trial Court.

One observes that the tenor of the findings recognized the differences in life styles between the natural parents (the father was not only forced to pick up the children at the servant's entrance, T.Tr. 102-3, but proceeded because as the Trial Court noted, he felt his children were in a "sheltered cocoon." App. 12, 20).

Finally as to the issues raised. In the Opinion at the Trial level, in the decision in the Court of Appeals and in our en banc petition, the Courts below had addressed to them all the issues appearing in this Petition as they themselves show.

The confusion of custody and adoption standards; perpetuating In the Matter of the Petition for Adoption of J.S.R., D.C. App., 374 A.2d 860 (1975); extending it; the procedural, notice and substantive issues that raised were pursued in our Briefs and Petitions, as the Opinions indicate. These issues as reasons to grant the writ are briefly addressed.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Ruling Below Has Decided an Important Question of Federal Law Affecting a Large Number of Divorced Citizens Which Has Not But Should Be Settled by This Court; and Which Appears In Conflict With Dicta From This Court.

Recent statistics support the commonplace statement that for every three or less marriages, there will be one divorce obtained. In 1970 there were roughly 2,158,000 reported marriages, 708,000 divorces; by 1977, with a much larger population, marriages increased only 20,000 while divorces exceeded 1,090,000 with the trend thereafter continuing in that proportion. See the World Almanac and Book of Facts 1980, by Newspaper Enterprise Association, Grosset & Dunlop Edition, pp. 951-952, 964.

Of that yearly number, a significant percentage affect not only the parents but the children of those divorces.

This Petition is about the intrusion of the "State" --- here the District of

Columbia --- into the relation of a divorced natural parent with his natural children, and its authorization through its adoption statutes of the permanent severing of that relation where there was no abandonment, abuse or unfitness on his part and no compelling necessity to grant the draconian relief of adoption for the alleged avoidance of stress over visitations and contacts with a natural father.

The scope, breadth and important issues of federal law decided seem fairly self-evident.

No less evident is that fact that while in other contexts decisions of this Court have addressed procedural and substantive issues that are related to the specific questions on this Petition, none has directly dealt with the important procedural and substantive rights of divorced parents.

Certainly dicta, assumptions or reservations in the past decade of cases in this area have implied that: (a) a "best interests" standard in a state or parental termination statute cannot be constitutionally used to cause the "breakup of a natural family." See Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 862-863 (1977)(Stewart, J., concurring in judgment), cited with approval in Quilloin v. Walcott, 434 U.S. 246, 255 (1978); (b) Smith itself clearly appears to recognize the importance of the "biological" relation and, while not excluding foster parents as "family" also seems to indicate that the "controversial" "psychological parent" theory is not per se a sufficient constitutional basis for eliminating the fundamental parent-child relationship summarized in Stanley v. Illinois, 405 U.S. 645 (1972). See Smith, 431 U.S. at 843-847 and ftn. 52; (c) recently in

Parham v. J.R., 442 U.S. 584 (1979) this Court emphasized in a different context where state intrusion appears more limited, justified, or does not involve permanent severance, then, natural parents and not the state retain the substantial if not dominant role with regard to children, absent a finding of neglect or abuse; that a child is not a creature of the state; and that statist notions allowing governmental power to intrude in these relations absent the most compelling reasons of essential need is repugnant to our traditions;* or as noted in Stanley, 405 U.S. at 650, absent a powerful countervailing interest, the natural parent-natural child relation undeniably "warrants deference (and) protection"; (d) in Caban v. Mohammed, 441 U.S. 380 (1979), this Court's Opinion expressly left open the question whether adoption is permissible absent a showing of unfitness.

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* Parham, 442 U.S. at 602-603.

Caban, 441 U.S. at 394, footnote 16. In that same decision, which incidentally followed Quilloin's adoption of the concurring statement in Smith, Justice Stewart appears to read that concurrence as one assuming "that each married parent after divorce has some substantive due process right to maintain his or her parental relation...." 441 U.S. at 397.

Undoubtedly some language in Quilloin may be read to imply a distinction in substantive and procedural protections between divorced parents and an existing family unit. On the other hand, Quilloin's emphasis on the fact that the father there, unlike the divorced parent, had never been a de facto member of the child's family unit suggests that if there is a distinction in when the state may intrude, it will require a good deal more of specificity in the statutory standards of "best interests" and

a great deal more than the most expansive reading of this record --- adverse emotional effects over visitation and greater security in the stepparent unit --- to overcome the constitutional rights at issue.

In this regard we noted in our original brief, reply brief and petition for rehearing en banc the erosion of the premises of the case which upheld the constitutionality of the District of Columbia statute at issue, In the Matter of Petition for Adoption of J.S.R., D.C.App., 374 A.2d 860 (1977).

Of course the panel hearing the cause was bound by that ruling; hence we suggested an en banc determination (Main Brief Statement of Issue 5, 9, pp. 3-4, 46-7; Reply Brief, p. 13; Petition for Rehearing En Banc, p. 5-7, 9-10).

The facial invalidity of the statute was and continues to be at issue by our attack on J.S.R., supra.

As we noted below, J.S.R. conflicts with the foregoing principles, and rulings in Virginia under a like statute. See Ward v. Faw, ___ Va. ___, 253 S.E.2d 658 (1979). See Malpass v. Morgan: Determining When a Parent's Consent to an Adoption is Withheld Contrary to the Best Interests of the Child, 60 Va.L.Rev. 718 (1974). We also noted that it conflicts with the principles of Davis v. Smith, ___ Ark. ___, 583 S.W.2d 37 (1979).

Equally important, we noted this:*

> The Premises of JSR, Relied on by the Panel, are so Faulty that it Either Should be Strictly Limited or so Clarified, Preferably By the Court En Banc, as not to Apply to the Constitututional Issues at Bar
>
> JSR --- the Opinion's answer to all our Constitutional issues, substantive and procedural --- relies on Winter v. Director, Department of Welfare, 217 Md. 391, 143 A.2d 81 (1958). (JSR, 374 A.2d at 863, end of Part I on procedural standard; JSR, 374 A.2d at 863-864, Part II for substantive right.)
>
> Winter, now 21 years old, was written long before Griswold, Roe, Stanley or any of the recent Supreme Court cases and did not even refer

*Petition for Rehearing, pp. 9-10.

to Prince and Meyer.[6] It specifically held that while the "natural" rights of the parent (rather than constitututional rights) must be "carefully guarded" (143 A.2d at 84), it also rested its entire ruling --- quoted in JSR --- on the fact that "(The) validity of (this) legislation permitting an adoption without the parents' consent is based on the fact that a parent has no inherent right..." That is not the law. That is most certainly not the current law; and JSR's resurrection of it is faulty in the extreme. Even JSR's opening reference to Stanley v. Illinois, so denied in principle by its quotations from Winter only a paragraph later, is inadequate to the constitututional right and issue involved --- the extent of the State's power to intrude where there is no compelling issue of safety, no physical needs to be met, no clear danger to health and no abuse or abandonment. The issue is not "natural" rights as Winter states but

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[6] Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 627 (1923); Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760 (1979).

> constitutional rights and how they are to be weighed. Interestingly in the Opinion at bar, p. 6, in citing the six factors to be considered by the Court and in fact considered below, the parent's constitutional right is absent.

We find that latter point rather significant, to say the least --- that when the Court of Appeals applied its standards to determining "best interests" the parent's constitutional right is wholly absent (App. 19, 409 A.2d at 1075).

JSR is a confusion of principles, including custody and adoption tests.

It rests on a psychological parent theory that arises from a book which specifically states that from its perspective a "non-custodial parent should have no legal enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits." Goldstein, Freud and Solnit, Beyond the Best Interests of the Child, 1979 Ed., p. 38.

Finally we suggest as below that the lack of notice in this statute renders it constitutionally defective for the very reasons noted in Davis supra and other referenced cases below such as Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa) affd. in part 545 F.2d 1137 (8 Cir 1956). See also In re William L., 447 Pa. 322, 383 A.2d 1228 (1978) which we noted had the kind of specificity in its termination statute, or was so construed, that is totally lacking here.

We read this current law to mean that (a) absent unfitness, abuse or abandonment, these rights cannot generally be severed permanently, even where there is divorce; that, alternatively, only if adoption is the sole alternative and something lesser will not satisfy to avoid imminent actual harm to a child may the adoption of a natural child be warranted absent

such conditions; and that specific conditions must appear in the statute or court decision to give notice of what specific events could serve as a basis for such final and total severance of the relationship. Using a custody or psychiatric standard is not permitted by constitutional demands, as a matter of substance, notice, or procedure. This Court should grant and allow the writ to hear these important undecided issues.

2. The Ruling Below Has Decided The Federal Question in a Way That Conflicts with the Decision of Another State Court and Involves Issues Related to a Cause Now Pending Before it.

For reasons already noted, it seems clear that this opinion conflicts with Faw supra, and the rationale of William L. and Davis supra. That fact warrants review.

This Court has recently noted probable jurisdiction in John Doe and Jane Roe v. Delaware, No. 79-5932, known below as

Matter of Five Minor Children, Del., 407 A.2d 198 (1979) in circumstances perhaps less compelling and with at least as much statutory specificity. We suggest that issues here directly relate to that action.

That our appeal is discretionary under Key or Palmore, supra, should not make a difference.

Recent reviews of family law tend to support our contentions about the importance of these subjects. The unsettled situation, the open questions, and the general direction that would favor the position urged in recognizing, among other things, that even in custody cases, divorced parents' rights should not be deemed substantially less, per se, because the unit is not housed in the same place; that visitations almost always create stress; and that the direction of this Court's decisions is properly to limit state intrusions to unfitness, abuse, or where because

of actual or imminent harm it is compellingly necessary and no less intrusive alternative is available; and then only under clear notice statutes. See Note, Developments in the Law - The Constitution and the Family, 93 Harv.L.Rev. 1156, 1319-20, 1322, 1326-29 (1980). Cf. Note, Application of the Vagueness Doctrine to Statutes Terminating Parental Rights, Vol. 1980 Duke L.J., No. 2, 336 (1980).

CONCLUSION

This Petition should be granted.

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION

EX PARTE IN THE MATTER OF the Petition of John O. LaGorce, II for the Adoption of Minor Children	)))))	Adoption No. A92-77

MEMORANDUM OPINION AND ORDER

Petitioner, J.O.L. filed the petition herein for the adoption of his wife's two minor children by a previous marriage. Respondent, the natural father of the minors, withheld his consent to the proposed adoption effectively halting any furtherance of petitioner's cause.[1/] Petitioner sought relief from the court pursuant to 16 D.C. Code

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1/ 16 D. C. Code 1973

§304 (a) A petition for adoption may not be granted by the court unless there is filed with the petition a written statement of consent, as provided by this section, signed and acknowledged before an officer authorized by law to take acknowledgements, before a representative of a licensed child-placing agency, or before the Commissioner of the District, or unless a relinquishment of parental rights with respect to the prospective adoptee has been recorded and filed as provided by section 32-786.

1973 §304(d) and (e),2/ and at the hearing on this matter, requested a finding in accordance with said provisions, that the respondent had abandoned his children and therefore his consent was not required, or in the alternative that respondent's consent was being withheld contrary to the best interests of the minors and therefore the petition should be granted. (R. 196)

I

Respondent and the children's mother were married to each other on May 5, 1961. The couple had two children, J.H.J. born on October 28, 1964 and E.E.J. born on January 27, 1967. In August 1967 the parents separated and on June 28, 1968 they were divorced. Custody of both children was awarded to the mother, and respondent by agreement was ordered to pay $75.00 per month towards the support of each child.

On April 25, 1969 the mother and petitioner were married and over the last nine years they have lived together with both children and the couple's first child, born on October 16, 1972, as members of a nuclear family. Petitioner, a

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2/ §304(d) When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required.

(e) The court may grant a petition for adoption without any of the consents specified in this section, when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child.

41 year old volunteer schoolteacher, has established himself as the surrogate father of the two children involved. The record is replete with acts which manifest the sincerety of his affection for them, and his attention to the emotional needs and development of these youngsters has been salutary. It is clear that respondent is a good father to these children and that they in turn identify with him as their psychological father. Petitioner and his wife are financially secure and there is no issue regarding their ability, independently or collectively, to provide for the material needs of the children.

(R. 197)

Respondent is a 39 year old experimental psychologist. After his divorce in 1968 he visited his children regularly until August, 1969 when he was hospitalized for a mental illness at the George Washington Psychiatric Clinic. After a brief stay of approximately twelve days he was released and in September, 1969 began visiting the children again. Despite his denials, the children's mother believed that respondent was a chronic schizophrenic and she insisted that petitioner be present during the visits with the children. Respondent did not favor this condition but abided by it until February, 1970 when his twice monthly visits ceased. There were no more visits until July, 1971. During this period respondent initiated five telephone calls in an effort to contact the children, but the parties could reach no agreement regarding the conditions for a visit and consequently none occurred.

After his last telephone call on November 1, 1970 respondent had no further contact with petitioner's family until eight months later in July, 1971 when he brought an action in the Family Division of the Superior Court in case number D 2065-71 to obtain less restricted visitation privileges with his children. In that month an order pendente lite was issued in said case granting

respondent twice weekly visitation privileges in the presence of a third party other than petitioner. On July 20, 1972 a final order was entered pursuant to a settlement agreement, according respondent liberal visitation privileges without the presence of any third party. After this respondent visited with the children three more times, the last occasion being in October, 1972.

On the visits following the pendente lite order respondent encountered considerable resistance from the children. They would create a ruckus and refuse to accompany him anywhere. At times he was insulted, and he was also accused of wishing to break up their family.

(R. 198)

The children complained that respondent badgered them regarding their lack of affection for him and made derogatory remarks about their mother. By his own admission respondent recognized that he was placing his children in a position of great emotional conflict, and at the expense of much personal pain, decided to discontinue his visits with the hope that when the children were older they would recognize the affection he felt for them and understand that he was a legitimate part of their lives. Respondent terminated his support payments in February 1973 because of his belief that they were unnecessary to provide for the needs of the children. The children's mother has expressed no desire to secure the resumption of those payments.

This action, filed in March 1977, was precipitated by a telephone call that respondent made to the children's mother requesting a photograph of them. Because there had been no communication from him since October, 1972 the mother felt it would be wrong to honor the request without professional advice. She consulted a child psychiatrist who recommended that no photograph be sent and that petitioner consult with legal counsel.

Subsequently, this petition to adopt the minor children and thereby terminate respondent's rights as their natural father was filed. (R. 199)

II

The petition alleges that respondent's consent is not required because he has abandoned his minor children.3/ In accordance with the statutory scheme it is the court's duty to determine whether such an abandonment has occurred.

The termination by law of the rights of a natural parent to his children on the grounds of abandonment is one of the most severe steps that a court may take. "The finality of the termination and the harsh connotations of a finding of 'abandonment' carry great emotional impact on both the child and the parent". In re Adoption of Sarver, 281 A.2d 890, 891 (Pa 1971). Accordingly, the court will be unwilling to make such a finding unless the record clearly warrants it.

The District of Columbia Code is silent as to the criteria to determine abandonment in a civil proceeding and, likewise, no appellate decision of this jurisdiction establishing such has been presented to the court.4/ The overwhelming majority

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3/ Id § 304 (d)

4/ In the abandonment cases presented from this jurisdiction, the factual determination of abandonment had been settled below and the issue of what constituted abandonment was not before the appellate court. See In the Matter of C.A.P., 356 A.2d 335 (D.C.C.A. 1976). Petition of J.E.G. and M.K.G., 357 A.2d 855 (D.C.C.A. 1976). White v In the Matter of N.E.M., 358 A.2d 329 (D.C.C.A. 1976)

of jurisdictions, however, are of the view that an abandonment within the purview of the adoption law must be absolute, complete and intentional.5/ (R.200) Abandonment by a parent therefore, means the neglect and refusal to perform the natural and legal obligations of care and support or conduct which evinces a settled purpose to forego all parental duties and all parental claims to the children. In re Adoption of Sarver, supra., In re Farquharson, 102 N.Y.S. 2d 230 (1950); Stalder v. Stone, 412 Ill. 488, 107 N.E.2d 696 (Ill. 1952); Shumway v. Farley, 68 Ariz. 159, 203 P.2d 507 (Ariz. 1949).

Certain specific acts of conduct may be distilled from the general case law as evidence of abandonment. Where the necessary criteria have not been established by statute, courts faced with this issue have focused in varying degrees, on whether the children were left permanently or identifinitely (sic) in the care of others;6/ whether the parent has deserted the children;7/ the voluntariness of the separation;8/ the period of time without any contact and the reasons therefor;9/ and the failure of the parent to provide for the support of the children.10/

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5/ Annot., 35 A.L.R. 2d 622, 664 (1954)

6/ In re Ewing, 96 Ida. 424, 529 P.2d 1296 (1974); Finn v. Rees, 65 Ida. 181, 141 P.2d 976 (1943)

7/ Shumway v. Farley, supra; In re Mayfield, 158 Or. 409, 76 P.2d 984 (1938); In re Davis, 142 Misc. 681, 255 N.Y.S. 416 (1932)

8/ In re Walpole's Adoption, 5 Ill. App. 2d 362, 125 N.E. 2d 645 (1955)

9/ In re Lieblich's Adoption, 207 Misc. 793, 141 N.Y.S. 2d 473 (1955)

10/ Annot., 35 A.L.R. 2d supra. 683 (1954).

(R. 201)

As a divorced parent without custody, respondent had limited contact with his children and fairness demands that he be judged accordingly. Respondent made several visits with his children from the time of his divorce until the last visit in 1972, often against the desire of their mother and petitioner, and continually sought legal recourse whenever that right was threatened. Though he prevailed in his efforts to secure that right he eventually ceased to exercise it when he perceived the potential for harm to these children. Despite the fact that five years passed between his last visit and the filing of the petition for adoption, respondent's motives militate against a finding of abandonment. Ironically, it was his continued interest in his children which precipitated this action that may terminate his parental rights. Petitioner admitted that the request for photographs was viewed as a signal that respondent intended to re-enter the children's lives and both he and his wife feared the psychological effect this might have had on them.

Based on these facts the court finds that respondent lacked the requisite intent for a finding of abandonment. In a similar case in Pennsylvania, the natural mother had not contacted her child in six years. She had refrained from doing so at the request of the child's guardian who was concerned that the child was becoming confused that she should have two mothers. The mother stated that she complied with the request because she did not wish to upset her own child. The Supreme Court of Pennsylvania in reviewing the case found that these motives were inconsistent with a finding that the mother intended to abandon the child. In re Adoption of Sarver supra. While that decision is not binding in this jurisdiction, the court finds the factual evaluation therein as being persuasive in the case at bar.

(R. 202)

The petition also raises the issue of respondent's failure to provide any support over the last five years. While the court does not sanction such conduct, under the circumstances of this case and the prevailing state of the law, it does not find petitioner's argument persuasive. Only a few courts have taken the position that this criterion alone is sufficient to establish abandonment and then such failure to support has been held as not even tending to establish an abandonment where such conduct is excused by the circumstances.11/ Our own statute imposes a burden on the court to find that respondent "abandoned the prospective adoptee and voluntarily failed to contribute to his support..."12/ Giving the statute its plain meaning, the legislative intent appears to be that the court must first reach a conclusion as to the question of abandonment and then couple it, where present, with respondent's failure to support. This ensures that lack of support be present before termination of parental rights on a finding of abandonment, but excludes it as a factor to be given great weight on the central issue of abandonment.13/

(R. 203)

When measured against this standard respondent's action appears to have been motivated by parental love and concern rather than dereliction

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11/ Id 680; 2 C.J.S. Adoption of Persons § 61(b) (1972)

12/ See n. 2

13/ In resolving this issue, the court takes into consideration the fact that the children's mother, a person of substantial financial resources, acquiesced in respondent's non-support. See Smith v. Crivello, 338 Ill.App. 503, 88 N.E.2d 107 (1949).

of duty. For these reasons the court cannot find that respondent's conduct evinces a settled intent to forego all parental duties and claims to his children sufficient to constitute an abandonment.

III

The petition also alleges that it is in the best interests of the minor children that they be adopted; that respondent's consent is withheld contrary to said interests; and that pursuant to 16 D.C. Code 1973 § 304(e) the court should grant the petition for adoption over respondent's objection.

It is the primary function of the court in these matters, to determine the best interests of the children and whether respondent is withholding his consent contrary to those interests. In re Petition for Adoption, 313 A.2d 874 (D.C.C.A. 1974). In re Adoption of a Minor, 97 U.S.App.D.C. 99, 228 F.2d 446 (1955). Petitioner has provided uncontroverted evidence of the emotional stability and physical well-being of the children in their present home. Petitioner's psychiatrist testified that the children accept petitioner as their psychological father and the court is urged to recognize in law what is already a fact. The recommendation of the social service department also cites this fact as the basis for its conclusion that the petition should be granted.

There is no question that the home petitioner provides for the children is the appropriate environment in which they should be reared. Unlike

the cases cited to the court[14/] the outcome of this action has no bearing on that fact. Custody of the children rests with the mother and the family unit will remain intact as long as petitioner and his wife wish.

(R. 204)

After the issue of custody is taken from consideration the effect of an adoption on the children's welfare would be manifest in the following ways. It would legitimatize the status of the children in their home and terminate respondent's legal right to have access to them.

The former has been recognized as a valid concern which must be weighed in petitioner's favor as being in the best interest of the children. This is especially true, whereas here, the evidence indicates that the children consider petitioner their father, often using his surname as their own. This issue was addressed in a situation where a petition for adoption was denied as not being in the child's best interest because the petitioner was of a different race. The court held that:

> The child is living in the happy home of its natural mother and stepfather, receiving the same loving care they give to the two children born of their marriage. That it is in the best interests of the child to live in that home with the natural mother is obvious.

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14/ In re J.H., 313 A.2d 874 (D.C.C.A. 1974); In re Adoption of a Minor, 79 U.S.App.D.C. 191, 144 F.2d 644 (1944); In re Adoption of a Female Infant, 237 A.2d 468 (D.C.C.A. 1968); Petition of J.E.G. and M.K.G., 357 A.2d 855 (D.C.C.A. 1976)

> It is equally plain that the child will continue to live there no matter what disposition is made of the case. Hence denial of adoption could only serve the harsh and injust end of depriving the child of a legitimatized status in that home.

In re Adoption of a Minor, 97 U.S.App.D.C. 99, 101 (1955). Furthermore, it has been held in this jurisdiction that the right of parenthood is greater than having mere custody.15/ Petitioner will bear all the burdens of being a father to these children as they grow up and it will be to their benefit to provide him with the full legal authority to be able to act accordingly.

(R. 205)

An adoption also results in a corresponding name change. While this fact alone is not of overriding importance, in view of the children's past behavior regarding this factor, there is no doubt that it will promote the sense of security they would enjoy within the established family unit.

The other effect of an adoption would be to terminate respondent's legal right to visit with his children. The court is in sympathy with respondent because the pain this would cause is understood. However, the record is clear that his visits have an adverse emotional effect on the children. Respondent not only admits this fact but stresses it as his reason for refraining from visiting them for the past five years. When discussing this resentment that his children feel

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15/ In re J.H., 313 A.2d 874, 875 (D.C.C.A. 1974)

towards him respondent acknowledges that "the probability is that they will not change". Nevertheless, respondent urges that the petition should be denied to prevent the father from anymore hurt than he has already endured. Unfortunately, the power of the court's writs falls short of the control of human emotions. Ever mindful of the pain it may cause, the ruling of this court must be according to law. The adoption proceeding is a creature of statutes and is a right that was unknown at common law. In re Jarboe's Estate, 235 F.Supp. 505 (D.C.D.C. 1964). As such, those statutes evince the will of the legislature and pursuant thereto it is the best interest of the children that must receive the overriding concern of the court. While respondent's interests as their natural father must not be unreasonably discarded, they must sit lighter in the scales of justice.16/

(R. 206)

These matters inherently involve predicting the future to some degree, but the court has not been imbued with the powers of a clairvoyant. The risk of error therefore accompanies any decision that it may render, However, if there is error the overwhelming conclusion based on the statutory scheme must be that the court should err in favor of the best interests of the children.

Respondent for five years failed to exercise his right to visit. A failure he states was based on his own concern because he recognized the emotional disturbance that his visits created. Nevertheless, he argues that he should be allowed to retain this right, in light of all the other benefits it would deny the children, so he may force the children from the "sheltered cocoon" in which

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16/ 2 C.J.S. Adoption of Persons § 93 (1972)

they exist and into the real world to acknowledge him as their father. There is merit in the contention that these children should acknowledge respondent's love for them as their natural father, but the course of action recommended to achieve that result is dubious at best. When viewed from the children's point of view, the choice is between giving final security to the family unit of which these children are in every way an integral part or leaving them to wander upon a course of uncertainty in the hope that someday they will be able to accept and benefit from respondent's love. The past experience suggests, and respondent admitted that that hope is a slim one. Based on this record, a ruling favoring the adoption is warranted.

In light of the statutory mandate and the evidence presented it is the conclusion of the court that the adoption is in the best interests of the children and that respondent is withholding his consent contrary to said interests. (R. 207)

Accordingly, it is this 3rd day of August, 1978,

ORDERED that the petition for adoption herein, be, and hereby is, granted.

Paul R. Webber, III

J U D G E

Copies to: Hal Witt, Esq., 1620 Eye Street, N.W. Washington, D.C. 20006, Attorney for Petitioner

Edward L. Genn, Esq., 1341 G Street, N.W., Suite 610, Washington, D.C. 20005 Attorney for Respondent

(Officially reported as "Petition of J.O.L." in 409 A.2d 1073.)

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 14014

IN THE MATTER OF:

The Petition of J.O.L. II
for the Adoption of Minor Children,

EUGENE JOHNSON III, APPELLANT.

Appeal from the Superior Court of the
District of Columbia

(Hon. Paul R. Webber III, Trial Judge)

(Argued September 21, 1979 Decided December 10, 1979)

Edward L. Genn for appellant.

Hal Witt, with whom *Janice S. Pohl* was on the brief, for appellee.

Before KELLY, FERREN and PRYOR, *Associate Judges*.

PRYOR, *Associate Judge*: Over the objection of appellant, the natural father of two children, the trial court granted a petition for the children's adoption by the stepfather. Appellant appeals, asserting that (1) the "best interests of the child" standard of D.C. Child*Code 1973, § 16-304(e) is substantively and procedurally unconstitutional as applied to a natural parent; and that (2) the

*(sic)

trial court erred in concluding there was clear and convincing evidence in the record to reach a conclusion that adoption by appellee is in the best interests of the children. After reviewing the case, we do not find that the court's judgment is erroneous or without evidence to support it, *Petition of Douglas*, D.C.App., 390 A.2d 1, 3 (1978), therefore, we affirm. (409 A.2d 1074)

Appellant and the children's mother were married in 1961. The couple had two children, the adoptees, one on October 28, 1964, the other on January 27, 1967. The parents separated in 1967, and were divorced on June 28, 1968. Custody of the children was awarded to the mother and by agreement, appellant was obliged to make monthly child support payments.

On April 25, 1969, the mother and appellee were married and began living together with the adoptees. In October 1972, a child was born to the couple. The three children, appellee and his wife presently live together as a family unit.

Appellant is a forty-year-old experimental psychologist. After his divorce from the adoptees' mother in 1968, he visited his children regularly until 1970.[1] As a consequence of a continuing dispute between appellant and the children regarding visitation, appellant stopped visiting the children. Attempts were made to resolve the problem, but the parties could not reach agreement. Thereafter, appellant brought an action in court and was subsequently granted visitation privileges. While this matter was pending in court, appellant attempted on several occasions to visit his children but encountered con-

[1] This period of visitation was interrupted briefly when, in August 1969, appellant was hospitalized for approximately twelve days for mental illness. Thereafter, in September 1969, appellant began visiting the children again.

siderable resistance from them. Recognizing that his visits were upsetting the children, appellant decided to stop visiting them until they were mature enough to understand the situation.

In March of 1977, having had no communication from appellant since October 1972, the children's mother received a phone call from appellant requesting a photograph of the children. This prompted consultation with a child psychiatrist. Not long afterwards, this action was instituted.

The trial court conducted an extensive hearing on the petition for adoption. The court heard from the children (*in camera*), the natural parents, and the stepfather. Witnesses testified about the interaction of the children with the appellee and their relationship with their natural father. A child psychiatrist stated his views as to the mental health of the children.

The court found that both of the adoptees viewed appellee as their "real father" and that he had become the psychological parent of the children. There was evidence that the children were under extreme emotional stress as the result of being legally obligated to visit with their natural father, but not desiring to do so. There was some question as to the appellant's mental health and his illegal use of drugs.

Acknowledging that the appellant at no time abandoned his children or otherwise abused them, the trial judge nevertheless concluded that the father's consent to their adoption by appellee was being withheld contrary to the children's best interests.

I.

We are concerned with a statute which, in pertinent part, reads as follows:

> The court may grant a petition for adoption without any [consent from natural parent(s)] . . . when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child. [D.C. Code 1973, § 16-304(3).]

We previously upheld the constitutionality of this statute in *In the Matter of Petition for Adoption of J.S.R.*, D.C. App., 374 A.2d 860 (1977). Appellant attempts to distinguish the facts in this case by arguing that in *J.S.R.*, *supra*, this court ruled on the facial constitutionality of the statute. In this instance, appellant requests that we rule on the constitutionality of the statute as applied to a natural parent. While we recognize that this distinction can properly be drawn in interpreting some statutes, we find that in this instance the argument is, in large measure, circular in nature. To argue that the adoption of a child without the consent of a natural parent, pursuant to a statutory standard of "best interests of the child," is defective constitutionally is to return to the issues raised and discussed in *J.S.R.*, *supra*. (1075)

In *J.S.R.*, *supra*, as in the instant case, it was the natural parent who questioned the constitutionality of § 16-304(e). While the appellant in that case did not specifically challenge the statute as applied to a natural parent, in reaching our conclusion that § 16-304(e) was not unconstitutionally vague, we noted, with approval, that the "best interest of the child" standard has been applied "in custody disputes between parents, and between parent and nonparent [as well as] . . . in child neglect cases . . . ." *J.S.R.*, *supra* at 863 (footnotes omitted). We see no reason to deviate from this standard in cases where natural parents challenge the adoption of their child by a stepparent, even where there is no show-

ing of abandonment and custody is not an issue in the case. The underlying objective is the same and that is to arrive at an arrangement that will be in the best interest of the child. This arrangement may require that the court (1) leave circumstances as it finds them, (2) change the custody of the child, or (3) grant a petition for adoption. The arrangement will be that which the trier of the fact finds to be in the best interest of the child.

We have previously recognized [2] that there is no precise formula for determining what is best for the child. Circumstances, foreseeable and unforeseeable, will vary across a wide spectrum. Experience has shown that it would probably be unwise to attempt to fashion a standard which would likely be more specific but also less flexible. In *J.S.R.*, *supra* at 863, we said:

> To say that such standard lacks precise meaning is not to say that it is without content and bounds . . . We think it is plain that the standard "best interest of the child" requires the judge, recognizing human frailty and man's

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[2] In *Bazemore v. Davis*, D.C. App., 394 A.2d 1377, 1383 (1978), this court stated that:

> A norm is ill-suited for determining the future of a unique being whose adjustment is vital to the welfare of future generations . . . [I]t is not asking too much to demand that a court, in making a determination as to the best interest of a child, make the determination upon specific evidence relating to that child alone . . . magic formulas have no place in decisions designed to salvage human values . . . [T]he trial court shall decide the delicate question of what is the child's best interests solely by reference to the facts of the particular case . . . .

See also: *In re N.M.S.*, D.C. App., 347 A.2d 924 (1975); *Coles v. Coles*, D.C. App., 204 A.2d 330 (1964).

> limitations with respect to forecasting the future course of human events, to make an informed and rational judgment . . .

The cumulative lesson of this approach is that it cannot operate with pinpoint precision but, more importantly, does allow the trial judge to evaluate the persons involved and the choices available. In this instance the trial judge applied the statute by considering at least the following factors: (1) questions of family stability, (2) present and future effects of adoption or non-adoption on the child, (3) interaction between the child and the contestants, (4) who the child perceives as his or her psychological parent, (5) the child's adjustment to his or her living situation, school, and community, and (6) mental and physical health of all interested parties.

Accordingly, we find no merit to the contention that the statute was unconstitutionally applied.

II.

As an additional ground for reversal, appellant urges that the trial court erred in concluding there was clear and convincing evidence in the record from which it could reach a conclusion that the adoption by appellee is in the best interest of the children.

During the course of a three-day hearing on the petition for adoption, the trial court heard from all interested parties, observed the demeanor of the witnesses and interviewed the adoptees in his chambers. The court found that the adoptees live in the home of their natural mother and stepfather both of whom assume an active role in the supervision and development of the children. The natural mother and stepfather love and care for the children as they do the child of their marriage.

*409 A.2d 1076

In reaching the conclusion that adoption was in the best interest of the children, the trial court noted:

> Respondent for five years failed to exercise his right to visit. A failure he stated was based on his own concern because he recognized the emotional disturbance that his visits created [sic]. Nevertheless, he argues that he should be allowed to retain this right, in light of all the other benefits it would deny the children, so he may force the children from the "sheltered cocoon" in which they exist and into the real world to acknowledge him as their father. There is merit in the contention that these children should acknowledge respondent's love for them as their natural father, but the course of action recommended to achieve that result is dubious at best. When viewed from the children's point of view, the choice is between giving final security to the family unit of which these children are in every way an integral part or leaving them to wander upon a course of uncertainty in the hope that someday they will be able to accept the benefit from respondent's love. The past experience suggests, and respondent admitted that that hope is a slim one. Based on this record, a ruling favoring the adoption is warranted. [Mem. Opinion and Order at 12.]

We are satisfied from a review of the record that the court's judgment is not erroneous or without evidence to support it.

Affirmed.

District of Columbia
Court of Appeals

No. 14014

IN THE MATTER OF:

The Petition of J.O.L. II for the Adoption of Minor Children,

EUGENE JOHNSON III, Appellant.

BEFORE: Newman, Chief Judge; *Kelly, Kern, Gallagher, Nebeker, Harris, Mack, *Ferren, and *Pryor, Associate Judges.

O R D E R

On consideration of appellant's petition for rehearing en banc or for rehearing, it is

ORDERED by the merits division that appellant's petition for rehearing is denied; and it appearing that a majority of the judges of this Court has voted to deny appellant's petition for rehearing en banc, it is

FURTHER ORDERED that the aforesaid en banc petition is denied.

PER CURIAM

Copies to: Honorable Paul R. Webber
Clerk, Superior Court
Edward L. Genn, Esquire
Hal Witt, Esquire
Janice S. Pohl, Esquire

*denotes merits division.
Associate Judges Gallagher and Mack would grant appellant's petition for rehearing en banc.

CONSTITUTION OF THE UNITED STATES

AMENDMENT I--FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT V

"No person shall be...deprived of life, liberty, or property, without due process of law...."

AMENDMENT IX

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

DISTRICT OF COLUMBIA CODE

TITLE 16

CHAPTER 3

ADOPTION

§16-304. Consent

(a) A petition for adoption may not be granted by the court unless there is filed with the petition a written statement of consent, as provided by this section, signed and acknowledged before an officer authorized by law to take acknowledgments, before a representative of a licensed child-placing agency, or before the Mayor of the District, or unless a relinquishment of parental rights with respect to the prospective adoptee has been recorded and filed as provided by section 32-786.

(b) Consent to a proposed adoption of a person under eighteen years of age is necessary:

(1) from the prospective adoptee, if he is fourteen years of age or over; and also,

(2) in accordance with the provisions of any one of the following paragraphs:

(A) from both parents, if they are both alive; or

(B) from the living parent of the prospective adoptee, if one of the parents is dead; or

(C) from the court-appointed guardian of the prospective adoptee; or

(D) from a licensed child-placing agency or the Mayor in case the parental rights of the parent or parents have been terminated by a court of competent jurisdiction or by a release of parental rights to the Mayor or licensed child-placing agency, based upon consents obtained in accordance with paragraphs (A) through (C) of this subdivision, and

the prospective adoptee has been lawfully placed under the care and custody of the agency or the Board; or

(E) from the Mayor in any situation not otherwise provided for by this subsection.

(c) Minority of a natural parent is not a bar to that parent's consent to adoption.

(d) When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required.

(e) The court may grant a petition for adoption without any of the consents specified in this section when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child.

(f) A person over eighteen years of age may be adopted, on the petition of the adopting parent or parents and with the consent of the prospective adoptee, if the court is satisfied that the adoption should be granted. As amended July 29, 1970, Pub.L. 91-358, Title I, § 145(a)(2), 84 Stat. 555; Oct. 22, 1970, Pub.L. 91-488, 84 Stat. 1086; July 22, 1976, D.C.Law, No. 1-75, § 5(e), 23 D.C.Reg. No. 6, p. 1177; Oct. 1, 1976, D.C.Law, No. 1-87, § 12, 23 D.C.Reg. No. 6, p. 1134.

Supreme Court, U. S.
FILED
AUG 11 1980
MICHAEL RODAK, JR., CLERK

No. 80-45

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EUGENE JOHNSON, III,

Petitioner,

v.

J.O.L., II,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR J.O.L., II, IN OPPOSITION

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Counsel for Respondent

August 11, 1980

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QUESTION PRESENTED

Is there any constitutional bar to a state statute which authorizes adoption of a child over the objection of a natural parent where the trial court finds, after a hearing, that the parent's consent is withheld contrary to the best interests of the child, even though there is no finding of parental abandonment.*

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*Respondent's statement of this question varies from petitioner's statement of his first question since petitioner's statement fails accurately to reflect the language of D.C. Code § 16-304(d) and (e) upon which the decision below was based.

There are no grounds for the court to review the second question presented by petitioner. There is no evidence in the decision below which indicates that a lesser constitutional standard was applied to a divorced parent than to one who is not divorced and there is nothing in the statute involved below which supports the assumption that such lesser standard was applied.

The third question presented by petitioner is also faulty as it inaccurately assumes the "lack of any specific substantive, procedural and evidentiary standards" for the interpretation of the adoption statute involved below.

PARTIES TO THE PROCEEDING

Petitioner is Eugene Johnson, III. Respondent is J.O.L., II. The mother of the adoptees, referred to by petitioner as the "former wife" (Pet. *ii*), was not a party below.

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Statute:

D.C. Code § 16-304 1

STATUTE INVOLVED

D.C. Code § 16-304 provides:

(a) A petition for adoption may not be granted by the court unless there is filed with the petition a written statement of consent, as provided by this section, signed and acknowledged before an officer authorized by law to take acknowledgments, before a representative of a licensed child-placing agency, or before the Mayor of the District, or unless a relinquishment of parental rights with respect to the prospective adoptee has been recorded and filed as provided by section 32-786.

(b) Consent to a proposed adoption of a person under eighteen years of age is necessary:

(1) from the prospective adoptee, if he is fourteen years of age or over; and also,

(2) in accordance with the provisions of any one of the following paragraphs:

(A) from both parents, if they are both alive; or

(B) from the living parent of the prospective adoptee, if one of the parents is dead; or

(C) from the court-appointed guardian of the prospective adoptee; or

(D) from a licensed child-placing agency or the Mayor in case the parental rights of the parent or parents have been terminated by a court of competent jurisdiction or by a release of parental rights to the Mayor or licensed child-placing agency, based upon consents obtained in accordance with paragraphs (A) through (C) of this subdivision, and the prospective adoptee has been lawfully placed under the care and custody of the agency or the Board; or

(E) from the Mayor in any situation not otherwise provided for by this subsection.

(c) Minority of a natural parent is not a bar to that parent's consent to adoption.

(d) When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required.

(e) The court may grant a petition for adoption without any of the consents specified in this section, when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child.

(f) A person over eighteen years of age may be adopted, on the petition of the adopting parent or parents and with the consent of the prospective adoptee, if the court is satisfied that the adoption should be granted.

As amended July 29, 1970, Pub. L. 91-358, Title 1, § 145(a)(2), 84 Stat. 555: Oct. 22, 1970, Pub. L. 91-488, 84 Stat. 1086; July 22, 1976, D.C. Law, No. 1-75, § 5(e), 23 D.C. Reg. No. 6, pp. 1177; Oct. 1, 1976, D.C. Law, No. 1-87, § 12, 23 D.C. Reg. No. 6, p. 1134.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-45

EUGENE JOHNSON, III,

Petitioner,

v.

J.O.L., II,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR J.O.L., II, IN OPPOSITION

STATEMENT OF THE CASE

On March 31, 1977, respondent (petitioner below) filed a petition for adoption in the Superior Court of the District of Columbia, Family Division, seeking adoption by respondent of the adoptees, Judith and Elliott. Respondent is married to the mother of the adoptees. Petitioner (respondent below), the biological father of the adoptees, withheld his consent to the petition.

Pursuant to D.C. Code § 16-304(e), a full evidentiary hearing was held on May 24, 25 and 26, 1978. The court entered its memorandum opinion and order on

August 3, 1978, granting the petition for adoption. Said order was affirmed by the District of Columbia Court of Appeals on December 10, 1979 and petitioner's petition for rehearing *en banc* was denied on March 27, 1980.

Petitioner and the mother of the adoptees were formerly husband and wife. Two children were born of that marriage, to wit, Judith, born October 28, 1964, and Elliott, born January 27, 1966.[1] Petitioner and the mother of the adoptees separated from each other in August 1967 and were divorced from each other on June 28, 1968 (Pet. App. 2).

Respondent and the mother of the adoptees were married to each other on April 25, 1969. A child was born of that marriage on October 16, 1972. The adoptees have lived with respondent since his marriage to their mother, a period of over nine years, as members of a nuclear family (Pet. App. 2). The trial court found that respondent was a good father to the adoptees and that they regarded him as their psychological father (Pet. App. 3). The trial court found that respondent's attention to the emotional needs of and development of the adoptees has been salutary (Pet. App. 3).

In July 1972, pursuant to an order of the Superior Court of the District of Columbia, petitioner was given certain visitation rights with the adoptees (Pet App. 4). Despite this order, petitioner visited with the adoptees on only three occasions, the last such visit having occurred in October 1972 (Pet. App. 4). Prior to the July 1972 order, petitioner had seen the adoptees only sporadically and infrequently (Pet. App. 3). Petitioner

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[1]The decision below states that Elliott's date of birth is January 27, 1967, while in fact it is January 27, 1966.

has not visited with the adoptees since October 1972. Petitioner voluntarily ceased to make support payments for the adoptees in February 1973 (Pet. App. 4). Petitioner has been hospitalized for a mental illness and there was some question as to his use of illegal drugs (Pet. App. 3, 16).

There was uncontroverted evidence at trial that the adoptees found the visits with petitioner to be emotionally painful and that such visits had an adverse emotional effect on them (Pet. App. 4, 11).

In March 1977, respondent filed the petition for adoption, after consultation with a child psychiatrist (Pet. App. 4). After the petition was filed the social service department recommended that the petition for adoption be granted (Pet. App. 9).

The trial court, in weighing the best interests of the adoptees, found that the adoption would give final security to the family unit of which the adoptees were in every way an integral part and that denial of the adoption would leave the children to wander upon a course of uncertainty (Pet. App. 13).

The trial court held that the adoption of the adoptees by respondent was in the best interests of the adoptees and that petitioner withheld his consent contrary to said interests (Pet. App. 9, 13). Accordingly, the trial court granted the petition for adoption (Pet. App. 13).

ARGUMENT

1. Petitioner contends that the petition for writ should be granted on the basis that the ruling below has decided an important question of federal law affecting a large number of divorced citizens which has not but should be settled by this Court, and which appears in

conflict with dicta from this Court. This contention is without merit.

Petitioner refers to recent statistics regarding the frequency of divorce in the past decade (Pet. 16). While such statistics are evidence of the frequency of divorce, they do not support petitioner's contention that adoption by a stepparent without the consent of one of the biological parents is a frequent occurrence or one which affects a large number of divorced citizens. Petitioner presents no evidence that such is the case. Indeed, the only case cited by petitioner which involves the rights of a biological parent in circumstances similar to those in the decision below is *Ward v. Faw*, ___ Va. ___, 253 S.E.2d 658 (1979). There is no evidence in that case, or any other cited by petitioner, as to the frequency of such factual circumstances.

Petitioner also contends that the ruling below has decided an important question of federal law in a manner which "appears" in conflict with dicta from this Court.

It is important to note that petitioner does not contend that the ruling below conflicts with any decision of this Court. Contrary to petitioner's contention, the decisions of this Court are in harmony, rather than in conflict, with the principles set forth in the ruling below.

This Court consistently has held that one of the liberties protected by the due process clause of the Fourteenth Amendment is the "freedom to establish a home and bring up children." *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923). *See also, Parham v. J.R.,* 442 U.S. 584 (1979); *Prince v. Massachusetts,* 321 U.S. 158 (1944); *Stanley v. Illinois,* 405 U.S. 645 (1972). These cases involve the issue of the constitutional limits of the state's power to supersede parental authority in matters involving the health, education and welfare of minor

children in the family unit when the opinion of the parents regarding such matters conflicts with that of the state.

This Court has guarded jealously the integrity of the family unit as a whole against intrusion by the state except when the physical or mental health of the children in the unit is jeopardized. The deference given to the family unit is based upon the recognition "that natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. at 602. It is recognition of the familial relationship between parent and child and not their biological relationship which underlies the constitutional protection accorded parental authority in the family unit. *Smith v. Organization of Foster Families,* 431 U.S. 816, 843–844 (1977).

In *Quilloin v. Walcott,* 434 U.S. 246 (1978), this Court affirmed the decision of the Supreme Court of Georgia in granting a petition for adoption by a husband of his wife's illegitimate son over the objection of the biological father and stated:

> [T]he result of the adoption in this case is to give full recognition to the family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and a denial of legitimation, "was in the best interests of the child."

Quilloin v. Walcott, 434 U.S. at 255.

The court below granted the adoption in order to give final security to the family unit in which the adoptees were in every way an integral part (Pet. App. 13). The court recognized that respondent was in fact the father

of the adoptees and reasoned that the adoption would benefit the children by providing respondent with the full legal authority to be able to act accordingly (Pet. App. 9, 11).

The decision below upheld the integrity of the family unit and strengthened the parent-child bond within it. Such decision is in harmony with the decisions of this Court.

2. Petitioner argues that the ruling below has decided the federal question in a way which conflicts with the decision of another state court and involves issues related to a cause now pending before it. This argument also is without merit.

Petitioner refers to a recent decision of the Supreme Court of Pennsylvania, *In re William L.*, 477 Pa. 322, 383 A.2d 1228 (1978), a recent decision of the Supreme Court of Arkansas, *Davis v. Smith,* ___ Ark. ___, 583 S.W.2d 37 (1979), and a case in which this court has noted probable jurisdiction, *Matter of Five Minor Children,* 407 A.2d 198 (Del. 1979), *prob. juris. noted* No. 79-5932 (S. Ct. March 24, 1980). All of these cases concern the constitutionality of statutes involving termination of parental rights rather than adoption. These statutes are dissimilar in both language and purpose to the adoption statute involved below and their constitutionality has no bearing upon the ruling below.

Petitioner's failure to recognize the distinction between such statutes and adoption statutes is indicative of his confusion regarding the distinction between family relationships, on the one hand, and biological relationships, on the other. It is the former and not the latter to which this Court has accorded priority.

Petitioner also argues that *Ward v. Faw*, ___ Va. ___, 253 S.E.2d 658 (1979), conflicts with the decision below. Petitioner's reliance upon this case is ill-founded and confused. There was no constitutional challenge to the statute involved in *Ward* and no discussion of its constitutionality either facially or as applied. Moreover, the decision of the Supreme Court of Virginia in *Ward* is consistent with the decision below. Contrary to petitioner's contention, the ruling below has not decided a federal question in a way that conflicts with the decision of another state court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

August 11, 1980

FILED
OCT 27 1980
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No. 80-45

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

EUGENE JOHNSON, III,
Petitioner,

v.

J.O.L., II,
Respondent.

ON A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENT'S MOTION TO DISMISS THE WRIT OF CERTIORARI

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October 27, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-45

EUGENE JOHNSON, III,

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ON A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENT'S MOTION TO DISMISS THE WRIT OF CERTIORARI

Respondent hereby respectfully moves that the writ of certiorari in this case be dismissed, and that the case be remanded to the District of Columbia Court of Appeals with instructions to remand to the Superior Court of the District of Columbia so that the adoption decree which is the subject of this case can be vacated.

This case commenced on March 31, 1977, when respondent (petitioner below) filed a petition for adoption in the Superior Court of the District of Columbia, Family Division, seeking adoption by respondent of the adoptees.

Respondent is married to the mother of the adoptees. Petitioner (respondent below) is the biological father of the adoptees.

Pursuant to D.C. Code § 16-304(e), a full evidentiary hearing was held on May 24, 25 and 26, 1978. The trial court entered its memorandum opinion and order on August 3, 1978, granting the petition for adoption. Said order was affirmed by the District of Columbia Court of Appeals on December 10, 1979, and petitioner's petition for rehearing *en banc* was denied on March 27, 1980. On July 10, 1980, petitioner filed with this Court his petition for a writ of certiorari. The Court granted the writ on October 6, 1980.

The relief sought by petitioner from this Court is the vacating of the adoption decree by the trial court.

Respondent desires to consent to the vacating of the decree by the trial court. While the case is in this Court, however, the trial court is without jurisdiction. Respondent submits, therefore, that this Court should dismiss the writ of certiorari and remand the case to the trial court so that the adoption decree can be vacated.

For these reasons, respondent suggests that the issues raised by petitioner in this case no longer affect either party, that no case or controversy is before this Court and that the writ should be dismissed and the case remanded so that the adoption decree can be vacated by the trial court.

Respectfully submitted,

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October 27, 1980

Supreme Court, U.S.
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No. 80-45

Supreme Court of the United States

October Term, 1980

EUGENE JOHNSON III,

Petitioner,

v.

J.O.L. II,

Respondent.

On A Writ of Certiorari to the
District of Columbia Court of Appeals

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE WRIT OF CERTIORARI WITH REQUEST FOR HEARING AND MEMORANDUM OF AUTHORITIES

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November 6, 1980

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PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE WRIT OF CERTIORARI WITH REQUEST FOR HEARING AND MEMORANDUM OF AUTHORITIES

The Petitioner, Eugene Johnson III opposes the Respondent's Motion to Dismiss the Writ of Certiorari on grounds and for reasons which hereafter appear in this

Opposition, its Affidavit and his Memorandum of Points and Authorities; and he requests hearing hereon if necessary.

1. This Motion is not consented to. It is a unilateral attempt to seek further rulings below that Respondent evidently believes may moot the cause. That relief could not moot the cause for a number of reasons. A case and controversy in which this Petitioner has a direct stake clearly continues if for no other reason than the statute at issue remains in force and effect and continues to apply to this Petitioner father whatever the lower Court may do. However, even before addressing that self-evident fact, there are substantial record and motion omissions that exist. Respondent was aware at the time of the filing of the Motion that it would not be consented to.

He has failed to state either the full record or recent facts, showing a pattern of like behavior that does not appear to show good faith in this effort. That, in itself, warrants forthwith denial of the Motion, without regard to a detailed analysis of the standards applicable to a Motion of this kind, especially one made at this time and under these circumstances. He has failed to support his Motion with legal authorities so that this Petitioner father might address the theory and cases on which he relies to satisfy the heavy burden that the law places upon him to sustain this Motion. A good faith Motion, not filed for delay or diversion, should have supplied those defects, including some evidence of good faith. Their absence has unnecessarily lengthened this Opposition and its Memorandum.

2. The Motion seeks to have the cause returned to the District of Columbia Court of Appeals and thereafter to the Superior Court because, in effect, the Respondent is suggesting that he now is agreeable to a vacating of the order for adoption. The Motion omits to mention the facts and inferences of lack of good faith that exist in his stated positions under oath or in filed briefs even in this Court. They include more than three years of legal action blocking the proper exercise of Petitioner's constitutional rights; they include irreparable loss of clear rights to have a relationship with his children and their consequences to Mr. Johnson during the pendency of this cause; they include the repeated filed oppositions of the mother and stepfather over the past three years of litigation to any change or relief to Mr. Johnson,

even to the stepfather's Brief in Opposition to Mr. Johnson's Petition for Writ of Certiorari. These attempts are merely what he has said and done in filed Briefs and papers.

3. The Motion does not address other critical facts or pertinent law that show that this cause is not moot. First, it is clearly, at best, a unilateral and "voluntary" attempt in another guise to agree that he will cease his wrongful actions if the lower Court involved agrees to vacate the order. At best, even if its good faith were not in issue, it does not satisfy or meet the applicable principles cited in United States v. Concentrated Phosphate Export Association, 393 U.S. 199, 203 (1968), which deal with unilateral attempts to moot causes in circumstances analogous to this where a party

agrees voluntarily to cease his improper conduct in bringing the action or taking the steps at issue. Furthermore, even if the order were vacated, it does not meet the objection that the same actions taken in the past years can be taken again under the unmodified statute that is being challenged; or in short, it does not meet the required standard that the proposed action not permit the case to be "capable of repetition" --- the standard noted in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). These principles are fully set forth in the Memorandum that follows.

4. With regard to the failure of the Motion to perform even the minimal requirement of setting forth both the full facts or any pertinent case authority to support it, the following should be observed: this case is not merely or even primarily merely about the vacating of a decree, even if the various Courts involved would agree to do it. It is about what led them to that result. As the Questions Presented in our Petition for the Writ reflect, it is about a "best interests" adoption statute; about standards applied to a divorced parent; about notice of prohibited conduct; about application of Court standards already determined even before this decision that gave the basis for the Order. It is about more. None of this would change in its application to Mr. Johnson, even if somehow the District of

Columbia Court of Appeals withdraws its Opinion, the lower withdraws its Opinion, the lower withdraws its objected-to findings, both underlying and ultimate, and the decree is somehow set aside, sometime.

5. The Motion rests on an inadequate statement of the issue and inaccurate statement of the record. Other portions of the record not heretofore noted further reflect the lack of good faith on the Respondent stepfather; and the probability of repetition by him and the mother. For example, the Motion begins by reciting that the case commenced on March 31, 1977 when a Petition for Adoption was filed. It neglects to state what the record in the trial and in proceedings below would show if this Motion had stated and encompassed the pertinent record (and, indeed, what is reflected in part in the Court's findings): that Mr. Johnson was

assured at the time of his original divorce in 1968 that he would not be deprived of meaningful and effective rights and visitation with his children; that he had to go to Court, in expensive and difficult proceedings on two occasions, to obtain Court Orders that he was otherwise entitled to without any question; that the natural mother and stepfather in this cause repeatedly insisted he should have no visitation rights after his first hospitalization; that they took steps, including the use of their substantial wealth, and the natural delaying process in the Courts, to inhibit the exercise of those rights while time was steadily passing, and that they intentionally alienated the children and inculcated them against the Petitioner who is their natural father. The record is replete with acts which do not reflect either truth or candor on the part of the natural mother or

the stepfather in dealing with this subject or their intentions. It reflects that before the Petition was filed, they attempted to obtain the consent of the natural father to the adoption even to bargaining off alleged support against it; and directly or indirectly made clear that if he resisted or if he reasserted visitation rights, he would be opposed at all stages, his personal life unrelated to that in the presence of or affecting the children, would be exposed, his hospitalizations and his relationships with women fully brought out and the like. In fact that did occur in the case. The stepfather and mother have persistently done anything and everything, including the effective use of their great wealth in these proceedings by causing multiple depositions, delays and disputes that lack genuine merit, merely to prohibit the exercise of the rights that this Petitioner father asserted. Their very Motion at this time after all these years is no more

than a reflection of that fact; and a carrying out now, in another guise, of what was done in the past.

6. The vacating of the Order, even if somehow effected, will not do away with the statute which affords these parties the further opportunity in the ensuing years to carry out in the same way these same actions. Even assuming that they would be able to obtain the elimination of the Court ruling in the D.C. Court of Appeals (which is not clear); and even assuming, for the sake of discussion, they could have the lower court vacate an Order which it entered based on specific findings then that dealt with best interests of the children (another matter that is not free from doubt); and even assuming the collateral and future effect of the findings in the lower Court were possible to remove (another matter in doubt); and even

assuming that the financial consequences of the decision including the fees unnecessarily and improperly incurred and support matters were resolved (issues not addressed and unlikely of resolution);* and even assuming all these doubtful matters were resolved promptly, this Petitioner father remains subject to the Respondent's use or threat to use a statute which is unconstitutional. That fact alone, without regard to any other, is one which will continually chill or stop his further relationship with his children for fear that he might be passing beyond the "best interests" test he deems constitutionally impermissible and improper, and is the subject of his appeal to this Court; or

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* The father asserts that the collateral effect of these findings in future actions is clear; that the "voidness" of the decree is important to financial aspects of the case including future claims and that he <u>will</u> be chilled.

it could lead to or cause another adoption to take place, perhaps on alleged "changed facts." That fear is real and supported by a reasonable likelihood of repetition if he meaningfully exercises his rights which he will do; a likelihood that would not receive an effective review. In this regard, without addressing other issues of "mootness," but simply to test the question of good faith, this Petitioner father requested of Respondent that he do two things before there would be further discussion about the nature of what would occur in the event the Order were vacated. He made clear that this was not a matter of settlement discussions for they would not even be entertained until minimal admissions were given. He therefore first insisted that Respondent provide him with an unconditional confession of error in bringing the action and pursuing it; and of equal importance to the issue of good faith, that the

stepfather agree, now and unconditionally, that in the event this Court for some reason rules contrary to the position of this Petitioner father on the merits, that nonetheless these Respondents would state now that they will still agree to have the Order vacated. That request is at least one test of the first requirement --- current good faith --- before any further meaningful discussions could be had. That demand was not agreed to. That refusal plainly underscores the claim of lack of good faith in the Motion and the stepfather's intentions.

7. Other issues and matters affect the Motion. The Order below did not address the relief that Mr. Johnson was requesting. It did not do so because it found the statute constitutional and, on the basis of the statute, granted the relief to the stepfather. Mr. Johnson's Answer and other pleadings show that he was seeking relief that goes beyond merely an Order that the Court declare the

unconstitutionality of the statute or its application. It sought as "appropriate relief" visitation rights in the light of improperly lost visitation.*

8. Mr. Johnson has lost four years with his children. Each day that goes by is a lost day, a right that he cannot effectively exercise or depend on in the future until this Court rules. Respondent

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*The Petition for Adoption did not even refer to his previous visitation orders that he obtained with considerable difficulty and expense in 1971 and 1972. It is of no small moment to the point made by him that the stepfather has not acted with candor or truth or full disclosure when it is recalled, as the record will show, that nowhere in the Petition for Adoption is there a reference to any Court Orders which he incorporated in his Answer and wanted the Court to enforce. The witness lists show 16 people whose depositions were taken on every subject imaginable in his life, causing him great cost and expense and dealing with matters that did not bear on the subject at all. There is an ample pattern to support his assertion that that will occur again.

stepfather with the mother has delayed and caused this natural father to lose critical time in his relationship with his children. A loss of a day or a week may not reach constitutional proportions; but four years lost in his relationship with these children is a very substantial loss that remains irreparable unless the strongest kind of remedies are provided. The omitted record clearly shows that once that attempt is made to effect those remedies, Mr. Johnson will be in Court again faced with the same statute, precedents and findings that are awaiting ruling here.

This Court granted the Petition to hear those matters. Nothing in the Motion supports a basis not to do so.

Wherefore Petitioner prays that the Motion be denied.

Respectfully submitted,

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November 6, 1980

No. 80-45

Supreme Court of the United States

October Term, 1980

EUGENE JOHNSON III,

Petitioner

v.

J.O.L. II,

Respondent

On a Writ of Certiorari to the
District of Columbia Court of Appeals

MEMORANDUM IN SUPPORT OF
OPPOSITION TO
MOTION TO DISMISS

While it is not mandatory that a Memorandum or Brief be filed in support of a Motion of this kind, the absence of any authority places this Petitioner at a decided disadvantage because it is unclear on what theory,

facts or precedent Respondent relies.

Simply to state that there is no case or controversy because of an alleged unilateral willingness to vacate the Order is not sufficient, as even a cursory reading of some of the authorities would indicate. See Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283 (1911) (actions capable of repetition); Moore v. Ogilvie, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494 (1969) (election held, statute unaffected); Carroll v. Princess Anne County, 393 U.S. 175, 178-179, 89 S.Ct. 347, 350 (1968) (actions could reoccur); Walling v. Helmerick & Payne, 323 U.S. 37, 43, 65 S.Ct. 11, 14 (1944) (unilateral discontinuance of acts complained of).

Without regard to the inadequate record to support Respondent, and even putting to the side the pattern showing lack of good faith or the matter of collateral consequences,

Roe v. Wade, 410 U.S. 113, 125, 93 S.Ct. 705, 713 (1973) seems a fairly clear obstacle to any mootness claim here. The same potential repetition there (a future pregnancy) that provokes application of the challenged law, is here in the exercise of Mr. Johnson's rights.

It might be noted that even in DeFunis v. Odegaard, 416 U.S. 312, 94 S.Ct. 1704 (1974), the majority and dissenting opinions appear to recognize (in circumstances where there was far less time "remaining" involved than is here present, and where there was no continuing application of an alleged unconstitutional statute) there were, at best, special circumstances only which permitted that matter to be deemed moot by the majority. It was the fact that Mr. DeFunis could not have had the admissions policy applied to him in the future, stated the majority, that was critical. The

majority view of the setting in DeFunis emphasized that the state officials involved had represented that "without regard to the ultimate resolution of the issues" that Mr. DeFunis would remain a student and graduate shortly because he was then in his final term. This meant, said the majority, he was "irrevocably admitted to the final term of the final year of the Law School course." (416 U.S. at 317) Since the relief he sought was an injunction "commanding his admission" (416 U.S. at 317); and since "the settled and unchanged policy" of the school permitted full exercise of all rights (416 U.S. at 320); and since "DeFunis will never again be required to run the gauntlet of the Law School's admission process" (416 U.S. at 319), the majority felt in that special case that the question "...is not 'capable of repetition' so far as he is concerned." (416 U.S. at 219) The dissents

of Justices Brennan, Douglas, White and Marshall emphasized that weeks remained to DeFunis and a number of "unexpected events" could occur that might delay his completion of the term. They underscored, 416 U.S. at 349, that:

> "...because the University's position implies no concession that its admissions policy is unlawful, this controversy falls squarely within the Court's long line of decisions holding that the '[m]ere voluntary cessation of allegedly illegal conduct does not moot a case.' United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968) (remaining citations omitted)....Since respondents' voluntary representation to this Court is only that they will permit petitioner to complete this term's studies, respondents have not borne the 'heavy burden,' United States v. Concentrated Phosphate Export Assn., supra, 393 U.S., at 203, 89 S.Ct., at 364, of demonstrating that there was not even a 'mere possibility' that petitioner would once again be subject to the challenged admissions policy. United States v. W. T. Grant Co., supra, 345 U.S., at 633, 73 S.Ct., at 898. On the contrary, respondents have positioned themselves so as to be 'free to return to [their] old ways.' Id., at 632, 73 S.Ct., at 897."

Using both the theory of the majority in DeFunis, and certainly the basis and grounds of the dissenting judges in the same case, the effect of that decision, applied to this case, plainly indicates its non-mootness.

Our statute remains in force, as we have said. This is an individual, and not a state official, who refuses to confess error. There is a strong pattern of past behavior showing lack of good faith. Mr. Johnson, unlike Mr. DeFunis, has not even been able to maintain and keep his relationship with his children and has lost irreparable time during the pendency of the actions. There are collateral consequences to the appeal and lower court findings, both financial and those applicable to the future exercise of rights which he intends to exercise to their fullest. DeFunis was attending school during the appeals -- i.e., receiving the benefit of the

relationship, whereas that is not the case at bar. The time factor here is far more extensive. At the time of the filing of the Petition, one of the children was about 12-1/2 and the other had just reached 11. Even after the three years that Mr. Johnson has been deprived of that relation --- unconstitutionally, and while they have grown --- they are still well below the age of 21 for support in the District of Columbia, or the statutory age of 18 referred to in the District of Columbia adoption statute.

In our cause, the statute continues, available for use; it chills; the relationship has been stopped; the collateral consequences are plain; even the vacating of the Order and its effect is uncertain.

This cause is expected to be heard in the near future in tandem with Doe v. Delaware, prob.juris. noted, March 24, 1980, 48 U.S.L.W.

3613, #79-5932. It deserves early resolution.

To sum up: Respondent did not present a full and fair record to the Court in his Motion. Even now, he would not unconditionally do that which is minimally required for good faith --- agree to a vacating whatever the result.

One observes in the decided cases that most frequently mootness arises from the mere passage of time or the fact that the challenged action no longer applies because the individual bringing the suit now has his residence, obtained the divorce, reached the proper age, passed through the procedure, or the like; and where, at best, depending on the views of the record, repetition is not really possible. This is a situation where unilaterally a private party is seeking to create mootness; and it is a party whose pattern of conduct does not reflect good faith.

Perhaps there was no pertinent authority supplied to support the Motion because, as we suggest, none exists.

The Motion deserves a swift denial.

Respectfully submitted,

Edward L. Genn
1319 - 18th Street, N.W.
Washington, D.C. 20036
(202) 638-2027
Attorney for Petitioner

AFFIDAVIT OF PETITIONER EUGENE JOHNSON III
IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS

Eugene Johnson III, being first duly sworn, deposes and says as follows:

1. That he has read the facts set forth in his Opposition and Memorandum.

2. That the facts stated therein with regard to matters in the record in this cause, the understandings of the parties prior to divorce and thereafter, the pattern of bad faith in the actions and purposes of the natural mother and stepfather, and the other facts set forth in the Opposition and Memorandum are true according to the best of his knowledge.

3. That the allegations of fact relating to his future intentions, the exercise of his rights, and the remaining allegations of fact therein asserted are likewise true.

Eugene Johnson III

Eugene Johnson III

Subscribed and sworn to before me the undersigned Notary Public, this 6th day of October, 1980.

Edward F. Gerber

Notary Public, D.C.

Supreme Court, U.S.
FILED
NOV 13 1980
MICHAEL RODAK, JR., CLERK

No. 80-45

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

EUGENE JOHNSON, III,
Petitioner,

v.

J.O.L., II,
Respondent.

ON A WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENT'S REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS THE WRIT OF CERTIORARI

HAL WITT
1620 Eye Street, N.W.
Washington, D.C. 20006
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Counsel for Respondent

November 13, 1980

Washington, D.C. • THIEL PRESS • (202) 638-4521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-45

EUGENE JOHNSON, III,

Petitioner,

v.

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RESPONDENT'S REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS THE WRIT OF CERTIORARI

Respondent will not reply to the shrill rhetoric in petitioner's opposition, but will confine himself to commenting on the arguments raised or suggested by petitioner.

1. Petitioner suggests that this case is not moot despite respondent's desire to have the adoption decree vacated. He suggests that this is a case of "mere voluntary cessation of allegedly illegal conduct" in the line of *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), and *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968). That is not true because here there is

no allegation of illegal conduct by respondent. Rather, this is a case where respondent has expressed a willingness to abandon a claim made pursuant to existing statutory procedures. Although petitioner attacks the constitutionality of the statute under which respondent's claim was pursued, that challenge no longer affects either party to this case because respondent is willing to abandon his claim. Respondent is not a public official responsible for future enforcement or application of the challenged statute. He has no further interest in defending its validity. Despite the litany of abstract hypotheticals posed by petitioner in his opposition, the statute's provisions would not affect the interests of either party to this case if the writ is dismissed.

2. This is not a case "capable of repetition, yet evading review" in the line of *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498 (1911), as suggested by petitioner. This Court has defined the contours of that doctrine and ruled that its application is appropriate only where two conditions are satisfied, that is, where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). *See also Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Sosna v. Iowa*, 419 U.S. 393 (1975). Because the adoption procedures complained of in this case are not by nature short-lived and have been fully litigated, the first condition is not met. Because there is no reasonable expectation that petitioner will be subjected to the same challenged procedure again in the future, the second condition is also unmet. Consequently, this case does not

satisfy the conditions permitting application of the "capable of repetition, yet evading review" doctrine, and the doctrine presents no bar to the dismissal of the writ. In addition, in order to provide further and complete assurance that the complaining party will not be subjected to the same action again, respondent will stipulate in the trial court that he will not again seek adoption under the challenged statutory provision.

3. Petitioner's opposition suggests that there were "other issues" raised in the trial court by his answer there. Those issues are not before this Court in any event, and their existence is additional reason for a remand to the trial court, not a basis for keeping the case here.

4. Any public interest in litigating the validity of the District of Columbia statute in this case is absent in light of respondent's lack of interest in the outcome of this case. The statute may be changed before it is applied again. As noted above, its application to petitioner would not be sought by respondent again.

The statutory challenge raised by petitioner in this case no longer affects either party. No case or controversy is before this Court. The writ of certiorari should be dismissed and the case remanded so that the adoption decree can be vacated by the trial court.

Respectfully submitted,

HAL WITT

1620 Eye Street, N.W.
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(202) 828-8240

Counsel for Respondent

November 13, 1980

Supreme Court, U. S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

No. 80-45

Supreme Court of the United States

October Term, 1980

EUGENE JOHNSON III,

Petitioner,

v.

J.O.L. II,

Respondent.

On A Writ of Certiorari to the
District of Columbia Court of Appeals

PETITION FOR REHEARING OF ORDER VACATING JUDGMENT AND FOR OTHER RELIEF

Edward L. Genn
1319 - 18th Street, N.W.
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Counsel for Petitioner
(202) 638-2027

November 20, 1980

Supreme Court of the United States

October Term, 1980

No. 80-45

EUGENE JOHNSON III,

Petitioner,

v.

J.O.L. II,

Respondent.

On A Writ of Certiorari to the
District of Columbia Court of Appeals

PETITION FOR REHEARING OF ORDER VACATING JUDGMENT AND FOR OTHER RELIEF

Petitioner Eugene Johnson III, by and through counsel, petitions this Court for a rehearing and or setting aside of the Order of the Court dated Monday, November 17, vacating the judgment herein and remanding

the cause to the District of Columbia Court of Appeals, and for leave to file the attached Response, on the following grounds:

1. A copy of the Order which forms the basis of this Petition is appended herein as Petition for Rehearing Exhibit 1. It was entered on Monday, November 17, 1980.

2. This Court granted the Writ to the Petitioner on October 6. Three weeks later on October 27, the Respondent filed a Motion to Dismiss stating the case should be vacated on the ground that, as the Motion originally stated, "Respondent desires to consent to the vacating of the decree by the Trial Court." (Motion, p. 1). The original Motion lacked any authorities or clear ground other than its statement that the Respondent would consent to the vacating of the Order. He did not say he no longer desired to adopt the children but instead, carefully addressed only the vacating of the order;

nor did he confess error; nor make any other assurances beyond a unilateral promise.

3. The Opposition was timely filed within 10 days and sought to address what were perceived as the legal issues as well as the facts asserted.

4. On the day before this matter was presented to this Court, that is, November 13, in the late afternoon, a Reply was submitted by the Respondent in which he dealt with the Opposition's points and authorities and added a further statement from counsel that he would not seek an adoption. This Reply was left at counsel's office in his absence. A call was made to the Clerk of this Court the following morning with a message that an objection and further pleading would be filed. It was indicated by the Clerk that the matter was then being considered by this Court.

5. New matters appear in the Reply which were not in the original Motion. They were considered by this Court in its November 17, 1980 Order, without any opportunity for reply or response by Petitioner.*

6. It is by no means clear that Respondent was entitled to make a Reply at all in this circumstance. If so, however, either that Reply should not have been considered as a basis for the Order because of its new matter, or some fair opportunity to respond should have been given. In fact, the Reply of November 13 is really the original Motion.

7. We attempted to provide that response over the weekend. We prepared it with the expectation of either its direct filing or a filing a Motion for leave to submit it. By the time the Response was brought to the Court before noon, this

*An opportunity to be heard, meaningfully, at a meaningful time, is fundamental. Cf. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Court had already ruled. The Response is attached as Petition for Rehearing Exhibit 2. Its filing is moved.

8. It is respectfully suggested that in view of the Court's consideration of the matters in the Reply and their additional elements, cases and representations, this Court should either vacate its November 17 Order or grant a Petition for Rehearing and entertain consideration of the Response.

9. What is not addressed by the current Order is the matter of the public importance of the issues as to which the writ was granted, the irrevocable loss of the relationship that has occurred, and the future effects of the statute. Although this Court's current Order has vacated the judgment of the District of Columbia Court of Appeals and it has not dismissed the matter on mootness grounds, the practical effect appears the same. It allowed a filing at

the last minute with case law and stipulations that it considered and it directed the Court of Appeals to consider, in circumstances where neither should be done.

10. It has indirectly granted Respondent a unilateral right to impair ongoing constitutional rights while the matter pends, allowing him further unlimited delay.

11. It has been noted in the Response and in this record that similar promises and assurances have been given in the past when consent orders were entered into, and they have not been complied with.

12. This Court's action was premature and failed to consider fully either the public interest in the matter --- which is the only pertinent question when mootness per se is removed --- or the record.

13. The Reply raises not insignificant mootness issues in causes before this Court.

We suggest and move that leave to file the attached Response be granted, the Petition be granted and/or the Order of November 17 vacated with the cause calendared for briefing and oral argument on the merits.

Respectfully submitted,

/s/

Edward L. Genn
1319 - 18th Street, N.W.
Washington, D.C. 20036
(202) 638-2027
Attorney for Petitioner

Certificate under Rule 51

Counsel certifies that this Petition is presented in good faith and not for the purpose of delay.

/s/

Edward L. Genn
Counsel for Petitioner

PETITION FOR REHEARING
EXHIBIT I

Order of This Court of November 17, 1980

"The judgment is vacated and the case is remanded to the District of Columbia Court of Appeals for further consideration in light of the position presently asserted by the respondent in his motion to dismiss filed October 27, 1980, the opposition filed thereto by petitioner on November 6, 1980 and the reply filed thereto by respondent on November 13, 1980."

No. 80-45

Supreme Court of the United States

October Term, 1980

EUGENE JOHNSON III,

Petitioner,

v.

J.O.L. II,

Respondent.

On A Writ of Certiorari to the
District of Columbia Court of Appeals

CERTIFICATE OF SERVICE OF
PETITION FOR REHEARING OF ORDER
VACATING JUDGMENT AND FOR OTHER RELIEF

I HEREBY CERTIFY that three copies of the foregoing "Petition for Rehearing of Order Vacating Judgment and For Other Relief" were mailed, first class prepaid, to Hal Witt, Esquire, 1620 Eye Street, N.W., Washington, D.C. 20006, attorney for Respondent, this 26 day of November, 1980.

Edward L. Genn
1319 - 18th Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner
(202) 638-2027

No. 80-45

Supreme Court of the United States

October Term, 1980

EUGENE JOHNSON III,

Petitioner,

v.

J.O.L. II,

Respondent.

On A Writ of Certiorari to the
District of Columbia Court of Appeals

PETITIONER JOHNSON'S RESPONSE TO THE RESPONDENT'S REPLY TO OPPOSITION TO MOTION TO DISMISS THE WRIT OF CERTIORARI

Edward L. Genn
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Counsel for Petitioner
(202) 638-2027

November 17, 1980

Pet. Reh. Ex. *2

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Supreme Court of the United States

October Term, 1980

No. 80-45

EUGENE JOHNSON III,

Petitioner,

v.

J.O.L. II,

Respondent.

On A Writ of Certiorari to the
District of Columbia Court of Appeals

PETITIONER JOHNSON'S RESPONSE TO THE RESPONDENT'S REPLY TO OPPOSITION TO MOTION TO DISMISS THE WRIT OF CERTIORARI

The Respondent J.O.L. II has filed a last-minute Reply to Petitioner Johnson's Opposition to his Motion to Dismiss. It was delivered, in counsel's absence, during the late afternoon just prior to the matter

being presented to this Court the next morning and at a time when it was impossible for counsel to respond.

The Reply is largely an original Motion, for it supplies some Points and Authorities whereas none were submitted with the Motion so they could be responded to, and it adds an alleged "stipulation" that was never give before during the more than 42 months of litigation in this cause. It provides both less than 24 hours before it was known that the matter was to be presented to the Court, and at a time when Mr. Johnson was without means to deal with it. Apart from whether a Reply is appropriate, certainly the failure to put this material in the original Motion so it could be addressed in the normal time given for an Opposition deserves note and warrants its rejection. Coming at this last minute, in a case where the Briefs are to be filed on November 20,

within a few days, it is simply too late, and unfairly so. Further, when the parties were notified on October 6, 1980 that Mr. Johnson's Petition for the Writ was granted, they were informed that it would be set for oral argument in the January session with John Doe and Jane Roe v. Delaware, No. 79-5932. At the same time, counsel were informed there would be no continuances of the Briefs or Joint Appendix. That aspect of the case has proceeded. In this circumstance, the very last minute filing of this Reply in this circumstance and on these grounds --- a voluntary action now taken after all the multiple refusals to do so earlier --- should be rejected in any event, unless it is indisputably clear that there is no possibility of a case or controversy before this Court. While we do not think it appropriate for a party to initiate a Motion without its bases stated so that it

could be responded to, and then, within 24 hours before the Court is to consider the matter, to submit his basic Points and Authorities, without an opportunity for counsel to respond in the normal course, still we recognize that even sua sponte this Court would have to consider whether a matter before it is moot. Normally that would occur where events or dates have passed which moot the cause. Here, while we have the respondent acting on his own to attempt to create that condition, we suggest that even this last minute effort hardly answers our Opposition. As a consequence, we have had to submit, for whatever consideration the Court may wish to give it, and on this very short notice, the matters set forth herein. We first address omitted factual matters, misapplications of the legal principles, and then misreadings of the cases cited in the Reply.

1. By no means is it clear, on the basis of the record, that this cause is moot. For reasons we have already stated, we think it indisputably not moot, if for no other reason, however characterized and altered in this last-minute Reply, this is nothing more than a voluntary cessation of the action by a person who could return to his previous ways. That doctrine is not circumscribed to apply only to "officials" or to "illegal" conduct. The thrust of the reason for that principle is not the characterization of the action, nor the name or office of the person, but rather that the promise of voluntary change, withdrawal or cessation --- unilaterally made while the law remains unchanged --- allows him to "return to his old ways under the existing circumstance." That is precisely the case here. The just filed Reply tries to create a special circumstance for

application of that principle (to officials or illegalities only) that simply does not exist. In our view respondent's actions are "illegal" in the sense of the constitutionally impermissible, just as in the cases noted the acts were illegal because they were statutorily impermissible. That aside, these parties can go right back and do what they did before and seek an adoption; or so may one on their behalf, or the children.

They attempt now, 24 hours before this matter is considered, after it has been pending in the Courts for three and a half years, to "stipulate" to what they "stipulated" in the original divorce in 1968 and in two Court orders in 1971 and 1972, but never fulfilled. They refuse any relief for more than 1200 days and on the final day, just before consideration by the Court, assert through a statement by counsel that they will tell the lower Court they will

not seek an adoption hereafter. Interestingly, (a) they do not confess error in the action; (b) nor do they still cover acts or contingencies to be done by others; (c) nor do they even now say that if this Court denies their Motion but rules for them on the merits, after oral argument, that they will agree to vacating the Order, which is an entirely different matter from what is stated in the Reply.*/

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*/ We have no doubt that if this Court should, as we think it must, deny the Motion, or if it denies it without prejudice to raise the issue of mootness in the Brief on the merits, they may well then say something to this effect. It will be no more believable, as Mr. Johnson's affidavit attached to our Opposition reflects, than their other proffers. That has been their course and conduct throughout. Only when absolutely compelled do they agree to something; and then only verbally, followed by acts that do not carry it out. It should be borne in mind that the persons who are saying they are willing now to "stipulate" also stipulated in 1968 in a settlement agreement incorporated in the Court Decree to grant visitation rights which they did not; they stipulated to a Consent Order

These matters aside, the simple fact is that years later, after all the actions taken here, a statement of this kind made for the first time, 24 hours before the matter is considered by the Court, is simply not to be accepted. Mr. Johnson has filed an Affidavit which stands unrebutted before this Court. It reflects a record showing that these individuals appear to have no respect for any Court Order where the children are involved. Further, they would always have an excuse to avoid the statement made by counsel in any event; the excuse would be changed circumstances, which could always be charged or serve as

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*/(continued) below that they would allow fair visitation, and they did not. They resisted every effort in the years of litigation by means which show that when the children have been involved, no statement that they have made is to be relied on. Indeed, if present counsel ceased representing them in the future, even this promise in a Reply would have no effect.

a justification for further action. Clearly when Mr. Johnson asks for joint custody or very heightened visitation that claim could be made. The fact is that with children and custody-related matters, the circumstances are constantly changing. The use of the adoption statute at issue and its "best interests" standard is thus a real fear, and a chill of clear substantive and procedural rights, once the attempt is made to exercise the substantive constitutional rights in the relationship.

Even if this last minute statement were credible, this Court cannot say, as a matter of law, that there is no reasonable expectation that these individuals on this record would not do the same thing.

Apart from that, they are not the ones alone who determine the matter.*/

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*/Their position now neither precludes others nor the children themselves. Indeed, the children have their own separate interest that the stepfather cannot represent.

Nor has the Reply responded to the fact that there is no assurance whatsoever that the D.C. Court of Appeals will withdraw its Opinion, and in fact we suggest that it will not. Nor will the Trial Court necessarily withdraw its decision, since it has clearly found that the alleged "best interests of the children" require an adoption.

The only "fact" that has occurred between that finding and now is that this Court granted the writ of certiorari.

Respondent suggests that they do not have any interest in the enforcement of the statute. They had a very strong interest in the enforcement of the statute for three and a half years, until 24 hours before this Court is to consider the Motion. Of course the District of Columbia has been notified about the pendency of the action as required by Rule 28, since the constitutionality of the statute is in question

and at issue; and the same will apply to the Briefs to be filed. The issue squarely before the Court of Appeals in its Opinion was nothing more than this issue: the constitutionality of the statute, procedurally and substantively; and this Court properly granted the writ to hear the issue that the Respondent urged on the Courts below --- that the statute is constitutional; it applies here and to Mr. Johnson; and it can be used to obtain an adoption. It borders on the disingenuous to suggest otherwise.

The Reply next suggests that the cause is private, and there is no public interest in it. There is considerable public interest in this case, reflected by the repeated attempts to present views of various groups by amici who filed in the case of Doe v. Delaware, 79-5932 with which this case is to be heard "in tandem" according to the

notice of grant of the writ; and from other groups; and there has been considerable media interest reflecting public interest as well.

This Court does not take cases that do not have significant public interest in them. This is one of those cases which not only has the kind of public interest that is reflected in its very grant of the writ; it involves one of the most important relationships, if not the most important relationship, in society that is in itself a matter of great public interest.

Therefore, unless it is indisputably clear and undeniably the case under the decided law, that there is no case or controversy or stake in the outcome, this Court should deny the Motion on this ground as well.

The public interest now is as great or greater, and the controversy is as real as it was when the suit was filed <u>against</u>

Mr. Johnson three and a half years ago, or on the day the Motion was filed, after the grant of the writ. The best interests of the children, whatever that may mean, and the constitutionality of that concept has not changed, nor is it changed by this Motion; and its application to Mr. Johnson has not been altered one whit. The position of the children has not changed; the position of Mr. Johnson has not changed; the statute has not changed; the ruling of the Trial Court has not changed; the Court of Appeals' decision has not changed. The only "change" is the grant of the writ followed by a statement in his Motion agreeing to a vacating of the order without a confession of error or the other matters noted in our Opposition; and now in his just-filed Reply a reference to some cases and a further statement he will tell the lower Court he will not seek an adoption in the few

years remaining before the children reach majority.

2. The Reply just submitted does not adequately reply to the voluntary cessation principles in the cases noted in our Memorandum in Support of the Opposition to Motion to Dismiss, p. 19. Nor does it address Roe v. Wade, 410 U.S. 113, 125 (1973) or DeFunis v. Odegaard, 416 U.S. 312 (1974), both of which we noted at length; nor the principles at p. 22, citing points in DeFunis dissents, with which the majority does not take issue but which it differently applied in that case. Applying the first test of United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 203 to this case, respondent attempts to limit it to public officials. The cases do not support him. Nor do they support his suggestion that there must be some statutory violation at issue before it applies. We urge this is neither so nor should be so.

He then supplies us for the first time with his reliance on references in Weinstein v. Bradford, 423 U.S. 147, 149 (1975) to the fact that the capability of repetition concept allegedly applies only where (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. He also cites Gannett*/, Nebraska Press**/, and Sosna***/. He turns that concept on its head, however, after wholly extracting it from context when he argues that our "duration" was not too short. It is too short,

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*/ Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898 (1979).

**/ Nebraska Press Assn. v. Stuart, 427 U.S. 539, 96 S.Ct. 2791 (1976).

***/ Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553 (1975).

where the cessation or expiration is something he can do at any time. If he can do what he wants to do now, and then himself cease and cause the action to expire at any time it will always be too short to be fully litigated because he could do this at any stage. That meets the first part of Weinstein. Indeed as noted in Nebraska Press (where the order at issue had expired) if this Court does not address our matter now, then on any review again, the next "dispute will evade review, or at least considered plenary review in this Court ...." 427 U.S. 539, 547, 96 S.Ct. 2791, 2797 (1976). That is so because by then the children or at least one of them will have reached majority so that we will be truly in a non-repeatable Weinstein/Sosna situation, solely because of delays in reaching the issue of the constitutionally impermissible.

The second element cited from Weinstein as to potential repeatability is so clearly met by our undisputed record that it would be unduly repetitious to underscore it.*/

One more last-minute suggestion of the Reply is that the statute might be changed. That is true in every case and not a basis for mootness.**/

---

*/ It might be noted in this regard that this is a case where Mr. Johnson is not a plaintiff, which might enable him more readily to file a class action. He is a defendant having a right taken away, initiated by the Respondent stepfather defending on the ground that the source of the action or any other action is a statute that is unconstitutionally applied to him.

**/ There is no indication that the statute is going to be changed at all; and, indeed, if we read the direction of the law, it is quite to the contrary. The tendency has been to expand the power of the State in this area to parental termination statutes and broader sweeps. It does apply now and it will continue to do so; and it was applied here not only to affect past facts and relationships but also the present and the future.

Contrary to what is asserted at page 3 of his Reply, there is general importance and "public interest in litigating the validity of the District of Columbia" adoption statute authorizing an adoption in the face of a natural father's objections, solely on the basis of considerations of "best interests of the children" where there is no unfitness, abuse or abandonment.*/

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*/ The Reply suggests that the fact there were other issues in the case below is more reason for a remand. That is specious. The issue is collateral consequences; and, indeed, in County of Los Angeles v. Davis, 440 U.S. 648, 99 S.Ct. 1379 (1979) this Court suggested that the basis of mootness there was not only that there was no expectation that the violation would occur again, but also that the interim relief and events completely and irrevocably eradicated the effects of the action. That is not the case here at all.

The strong public interest that was evidenced by this Court's grant of the Petition remains. The case, the controversy and the disputes remain. The assertions in this last-minute Reply are not responsive to the issues nor the pertinent cases we have referred to. It might be noted that the underlying facts asserted in our Opposition are not disputed. In their stead is the customary attempt to characterize facts by some phrase such as "shrill rhetoric" (Reply p. 1); it transparently is no substitute for record facts; facts which may even be "shrill" over these many years.

While we do not believe that there can be serious doubt that all of the factors which prevent this cause from being determined as moot are clear, and for that reason, the motion to dismiss should be denied forthwith, we certainly are of the view, and we think it is indisputably the

case, that it should not be granted on this record and in this circumstance.

The final irony is that the Motion to Dismiss has now added a further matter of moment to the other issues as to which the writ was granted --- a case and controversy about mootness standards themselves, in this kind of cause through this method.

The Motion should be denied.

Respectfully submitted,

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No. 80-45

Supreme Court of the United States

October Term, 1980

EUGENE JOHNSON III,

Petitioner,

v.

J.O.L. II,

Respondent.

On A Writ of Certiorari to the
District of Columbia Court of Appeals

I HEREBY CERTIFY THAT three copies of the foregoing were hand-delivered to the office of Hal Witt, Esquire, 1620 Eye Street, N.W., Washington, D.C. 20006, attorney for Respondent, this 17th day of November, 1980.

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